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Nos. 80-1798 and 80-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR RESPONDENT UNIONS IN OPPOSITION

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MEMORANDUM FOR RESPONDENT UNIONS IN OPPOSITION

As stated by the petitioner in one of these cases:

> The questions presented in this case are similar and related to those in *Donald Schriver, Inc., et al.* v. *N.L.R.B.*, numbered in this Court as Case No.

80-1257, in which a petition for writ of certiorari has been filed.[1]

On May 4, 1981, this Court denied the Petition for Writ of Certiorari in *Donald Schriver*, *supra*, 49 U.S. L.Wk. 3825.

In the instant case the Ninth Circuit concluded, as had the District of Columbia Circuit in *Donald Schriver*, 635 F.2d 859, that the Labor Board's unanimous interpretation of the construction industry proviso to § 8(e) is correct and that the contract provisions challenged herein are lawful. The present petitions and the briefs *amici* which have been submitted in their support offer nothing that would justify the grant of certiorari here after its denial in *Schriver*.[2] Rather, those on petitioners' side stress that the interpretation of the proviso has consequences which they think are undesirable. Such arguments are, of course, far wide of the mark because the disagreement of one group of partisans with Congress' resolution of an issue of economic policy cannot possibly justify an exercise of this Court's certiorari jurisdiction.

The court below delivered a thorough and well-reasoned opinion, as did the *Schriver* court of appeals.[3] We can-

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[1] Petition for Certiorari in No. 80-1798, p. 1. This statement is reiterated, *id.* at p. 6, n. 4.

[2] See the Brief for Respondent Unions in No. 80-1257, pp. 2-5, which we believe sets forth the heart of the D.C. Circuit's analysis of the pertinent legislative materials.

[3] Because heavy reliance is placed in the petitions on Judge Sneed's dissenting opinion, it is appropriate to emphasize that his dissent acknowledged that "Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases." (Pet. App. in No. 80-1798 at p. 47.) Senator Kennedy was the Chairman of the Senate conferees. Accordingly, the majority below, like the District of Colum-

not improve upon that analysis. Accordingly, and for the reasons stated in the Brief in Opposition of the National Labor Relations Board, with which we are in agreement, we submit that the petitions for certiorari in these cases should be denied.[4]

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bia Circuit, gave significant weight to his explanation of the construction industry proviso:

> *"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e)."* (*Id.* at p. 18, quoting 105 Cong. Rec. 17900, court's emphasis.)

See, in addition, the D.C. Circuit's opinion in *Donald Schriver*, 635 F.2d at 879. The latter court also quoted the following from the same statement by Senator Kennedy:

> "The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them." (*Id.*)

It may be noted also that the other statements in the legislative history cited by Judge Sneed do not contradict what Senator Kennedy said; they merely give examples of conduct which would be legal under the construction industry proviso without any indication that those examples were intended to be exhaustive. Moreover, Senator Kennedy's statement is entirely consistent with what was decided by this Court in *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616. The Union in that case was engaged in an entirely novel organizing device, and the agreement which was there struck down had no antecedent in the construction industry at the time of the 1959 amendments. By contrast, contracts of the kind challenged in the present case were well known at that time. (See the opinion below, Pet. App. in No. 80-1798, pp. 20-21, and 635 F.2d at 879-880 (D.C. Cir.)).

[4] Petitioners seek to raise one issue which was not before the Court in *Donald Schriver*, namely, whether it is a violation of § 8 (b)(4)(A) for a union to strike to obtain an agreement which is lawful under the construction industry proviso of § 8(e). But the General Counsel, exercising his exclusive statutory authority to determine the scope of unfair labor practice complaints (see §§ 3 (d) and 10(b) of the Act) did not proceed on that theory and

Respectfully submitted,

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it was neither litigated before, nor decided by, the Board. And, assuming that the issue is nevertheless open, petitioners did not preserve it for review as required by § 10(e). See, *e.g.*, *Labor Board* v. *Mine Workers*, 355 U.S. 453, 463-464. In any event, the proposition that a strike (or other activity covered by § 8(b)(4)(ii)) is forbidden by § 8(b)(4)(A) if its object is to obtain an agreement which is lawful by virtue of the construction industry proviso to § 8(e) is irreconcilable with the language of § 8(b)(4)(A):

> "forcing or requiring any employer or self-employed person * * * *to enter into any agreement which is prohibited by § 8(e)*." (Emphasis added)

That proposition has therefore been rejected by every Court of Appeals to which it has been presented and, after an initial false start, by the Board. *Essex County and Vicinity Dist. Council of* v. *NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Constr. Prod. & Maintenance Laborers Union, Local 383* v. *NLRB (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9 Cir., 1963). See also *Northern Indiana Bldg. and Const. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964) overruling *Constr. Prod. & Maintenance Laborers Local 383 (Colson & Stevens Constr. Co.)*, 137 N.L.R.B. 1650 (1962).